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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-689

MICHAEL ANTHONY MANESS, *Petitioner,*

versus

THE HONORABLE JAMES R. MEYERS, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE 169th JUDICIAL DISTRICT COURT OF BELL COUNTY, TEXAS

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Petitioner Michael Anthony Maness, a licensed attorney admitted to practice before the courts of the State of Texas and before the Supreme Court of the United States, respectfully prays that a writ of certiorari issue to review a final judgment rendered on September 28, 1973 by Respondent James R. Meyers, presiding by special designation as Judge of the 169th Judicial District Court of Bell County, Texas, who found the Petitioner guilty of criminal contempt of court and sentenced him to pay a $500 fine.

THE OPINION BELOW

No formal written opinion was filed by the Court below in connection with the contempt judgment against the Petitioner.

JURISDICTION

The judgment of criminal contempt against the Petitioner, dated September 28, 1973 and entered of record on October 1, 1973, is reproduced in Appendix A of this petition at pages 27-29. Filing of the petition was timely under Rule 22(1) of the Court.

The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3). For the following reasons, the contempt judgment entered by the Respondent against the Petitioner constitutes a final judgment or decree rendered by the highest court of the State of Texas in which a decision could be had.

Under established Texas law "there is no right to an appeal from an order of contempt. The *only* remedy to review such an order is by writ of habeas corpus, *when relator is in custody.*" *Arnold v. State*, 493 S.W.2d 801 (Tex.Cr.App., 1973) (emphasis added); *Gardner v. State*, 171 Tex. Cr. R. 521, 352 S.W.2d 129 (1961); *Deramus v. Thornton*, 160 Tex. 494, 333 S.W.2d 824, 827 (1960); *Wagner v. Warnasch*, 156 Tex. 334, 295 S.W.2d 890, 893 (1956). Since the judgment of contempt imposes only a fine rather than imprisonment as punishment, the Petitioner has never been "in custody" to the extent of being physically confined in a jail; by its terms the contempt judgment allowed a grace period of approximately two weeks for payment of the fine, permitting the Peti-

tioner to remain at large on a personal recognizance bond while seeking further review of the matter in the Texas appellate courts.

Mistakenly believing that the unsatisfied contempt judgment, the continuing obligation to pay the fine, and the restriction on freedom of action necessarily implicit in the giving of his personal recognizance bond would support the exercise of State habeas corpus jurisdiction,[1] the Petitioner presented a motion for leave to file an original application for the writ of habeas corpus in the Texas Court of Criminal Appeals on October 11, 1973.[2] On the same day the Court denied that motion by an order reproduced in Appendix B of this petition at page 33.

Immediately thereafter, again on the same day (October 11, 1973), the Petitioner filed an identical application in an unsuccessful effort to invoke the original habeas corpus jurisdiction of the Texas Supreme Court.[3]

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1. *Cf. Jones v. Cunningham*, 371 U.S. 236 (1963); *Marden v. Purdy*, 409 F.2d 784 (5 Cir., 1969).

2. As the State's highest appellate court in criminal cases, the Court of Criminal Appeals has consistently regarded the exercise of its original habeas corpus jurisdiction as the exclusive remedy (subject to the exceptions noted hereafter) in all cases of civil or criminal contempt resulting in actual physical imprisonment. See, e.g., *Ex parte McDonald*, 447 S.W.2d 938 (Tex. Cr. App., 1969).

3. As the State's highest appellate court in civil cases, the Supreme Court exercises original habeas corpus jurisdiction limited exclusively to situations in which an individual has been confined for disobedience of an order, judgment or decree in a civil proceeding. *Ex parte Morris*, 162 Tex. 530, 349 S.W.2d 99, 101 (1961); *Ex parte McDonald*, 441 S.W.2d 828 (Tex. S.Ct., 1969).

Similarly, the Texas Courts of Civil Appeals (the State's intermediate appellate courts in civil cases) exercise original habeas corpus jurisdiction limited exclusively to situations in which an individual has been confined for disobedience of an order, judgment or decree in a

The order denying relief is reproduced in Appendix C of this petition at page 34.

Because the terms of the contempt judgment provided that the $500 fine was to be paid by noon on the following day (October 12, 1973), the Respondent entered an order continuing the Petitioner on his personal recognizance bond, despite his failure to pay the fine, in order to permit the filing of a petition for the writ of certiorari in this Court.

In these circumstances the peculiarities of Texas contempt law have left the Petitioner without a remedy. There is no direct appeal from a judgment of contempt. The denial of habeas corpus relief by both the Court of Criminal Appeals and the Texas Supreme Court is consistent with previous decisions that refuse to permit a collateral attack on an unsatisfied judgment imposing a fine, even though the judgment may be (1) otherwise unappealable, (2) subject to instantaneous enforcement by coercive confinement through the issuance of a capias or writ of attachment, or (3) secured by a personal recognizance bond. *Ex parte Nichols,* 158 Tex. Cr. R. 218, 254 S.W.2d 518 (1952). Mandamus is also unavailable, apparently on the theory that habeas corpus will be available if the individual is actually taken into physical custody. *Deramus v. Thornton,* 160 Tex. 494, 333 S.W.2d 824, 831 (1960) (on motion for rehearing). In short, a contempt judg-

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divorce, support or child custody proceeding. *Ex parte Hosken,* 480 S.W.2d 18, 24 (Tex. Civ. App., 1972).

Although the Petitioner was not adjudged in contempt of court for having violated a judicial order, judgment or decree, he nevertheless sought habeas corpus relief from the Texas Supreme Court as a precautionary measure in an effort to pursue every potentially available remedy; no others remained.

ment imposing only a fine is not reviewable in any Texas court if the contemnor is not literally "in custody," the situation that exists here.

For the foregoing reasons, the contempt judgment against the Petitioner constitutes a final judgment or decree to which this Court's certiorari jurisdiction extends under 28 U.S.C. § 1257(3). *Stanford v. Texas*, 379 U.S. 476, 480 (1965); *Thompson v. City of Louisville*, 362 U.S. 199, 202-03 (1960); *cf. Largent v. Texas*, 318 U.S. 418, 421-22 (1943); *Powell v. Texas*, 392 U.S. 514, 517 (1968); *Grovey v. Townsend*, 295 U.S. 45, 47 (1935).

QUESTIONS PRESENTED

1. Whether an attorney who in good faith advises his client to invoke the Fifth Amendment privilege against self-incrimination, and who is thereafter adjudged in contempt of court solely because the client follows that advice by refusing to comply with a subpoena duces tecum demanding a potentially self-incriminatory production of documentary evidence, is thereby deprived of rights guaranteed by the Fifth, Sixth, Ninth and Fourteenth Amendments.

2. Whether the Fifth Amendment privilege against self-incrimination may properly be invoked to resist compliance with a subpoena duces tecum demanding a potentially self-incriminatory production of magazines that have previously been displayed for commercial distribution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner's Federal constitutional claims are grounded primarily on the Fifth Amendment privilege

against self-incrimination, the Sixth Amendment right to effective assistance of counsel, the Ninth Amendment residuum of individual substantive rights, and the Fourteenth Amendment guarantee of due process of law.

The relevant provisions of the Texas obscenity statute (Article 527 of the Texas Penal Code) and contempt statute (Article 1911a of the Revised Civil Statutes of Texas) are reproduced in Appendix D of this petition at pages 35-36.

STATEMENT OF THE CASE

On February 1, 1973 the Petitioner appeared as one of the counsel of record for the Defendants in the trial of Cause Number 57,284-C, *The City of Temple, Texas v. Michael McKelva, Allen Boyer and T. C. McKelva, et al.*, an action then pending before the 169th Judicial District Court of Bell County, Texas, the Honorable J. F. Clawson presiding. In this suit the City of Temple, as Plaintiff, sought a permanent injunction under section 13 of Article 527 of the Texas Penal Code to restrain the Defendants from selling allegedly obscene matter in violation of both Article 527 and the provisions of a virtually identical municipal ordinance (purporting to regulate obscenity through the imposition of criminal sanctions) that had previously been enacted by the City and under which Defendants Michael McKelva and Allen Boyer had previously been tried and convicted [Tr. 2-11; S.F. 21-22A].[4]

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4. The abbreviation "Tr." refers to the Transcript in Cause Number 57,284-C; "SF" refers to the Statement of Facts (transcript of testimony) of the hearing on the application for a permanent injunction in that cause; "SFC" refers to the Statement of Facts of the Petitioner's contempt hearing.

Two days before the trial of Cause Number 57,284-C, on January 30, 1973, Defendant Michael McKelva had been served with a subpoena duces tecum directing him to produce fifty-two named magazines before the 169th Judicial District Court at 9:00 a.m. on February 1, 1973 and to appear before the Court at that time to give testimony as a witness in the trial of the City's application for a permanent injunction. The subpoena identified the magazines only by title, without further description of any sort, and was issued by Mr. Hugh L. Taggart, Clerk of the Court, at the request of Mr. William T. Wilson, counsel and City Attorney for the Plaintiff City of Temple [Tr. 27-28].

Prior to the trial of Cause Number 57,284-C, Petitioner's co-counsel filed a timely motion to quash the subpoena on behalf of Defendant Michael McKelva [Tr. 29-30], contending in that motion that compulsory production of the magazines pursuant to court process would contravene Mr. McKelva's privilege against self-incrimination. The motion to quash was thereafter orally argued before the Court on February 1, 1973, after counsel for both sides had stipulated in open court that Mr. McKelva did not possess or have access to five of the fifty-two publications named in the subpoena [S.F. 5-6, 10].

With respect to the remaining forty-seven magazines, as counsel for Mr. McKelva, the Petitioner urged in his argument before the Court on the motion to quash the subpoena that the publications in question dealt "explicitly with acts of a sexual nature" and that, particularly in view of the preceding criminal prosecutions that had been initiated against Mr. McKelva by the City of Temple, production of any of the magazines under the compulsion

of a subpoena duces tecum would entail a real, appreciable and substantial possibility of self-incrimination [S.F. 6-10].

Following this argument Judge Clawson thereupon overruled the motion to quash [S.F. 15], after which counsel for both sides stipulated in open court that Defendants Michael McKelva and Allen Boyer had previously been convicted in the Municipal Court of the City of Temple, Texas in seven criminal cases involving the sale of allegedly obscene matter [S.F. 21-22A].

Michael McKelva was then called by counsel for the Plaintiff to testify as a witness on behalf of the City, and the following transpired:

"BY MR. WILSON:

Q. State your name and occupation to the Court, please.

A. My name is Michael McKelva. I live at 526 Wolf Street in Killeen, Texas. I am the operator of Mike's News in Temple, Texas.

Q. And is that Mike's Newsstand at 118-A South First Street?

A. Yes, sir, it is.

Q. Mr. McKelva, were you served with a subpoena requesting you to bring certain magazines, certain titled magazines to Court today?

A. Yes, sir, I was.

Q. And do you have those with you here today?

A. Sir, under the advice of Counsel, I refuse to answer on the grounds that it may tend to incriminate me.

Q. Do you recall the day when you were served with a copy of this subpoena?

A. Yes, sir, I do.

Q. And what was that day?

A. I believe that was day before yesterday.

Q. Did you at that time have in your possession the magazines listed in the subpoena?

A. Under the advice of Counsel, I plead the Fifth.

Q. Are you saying to the Court then that you did not bring those into Court today, the magazines listed in that subpoena?

A. Under the advice of Counsel, I refuse to answer on the grounds that it may tend to incriminate me.

MR. WILSON: Your Honor, may we approach the bench?

THE COURT: Yes, sir.

(Conference of Court and Counsel.)

MR. WILSON: Your Honor, at this time, in response to the answers to the questions by Mr. McKelva as to the subpoena, a subpoena which was issued in this cause, I would ask the Court to instruct the Defendant, Michael McKelva, to produce the magazines listed in the subpoena within a reasonable time and if he refuses to hold him in contempt of Court." [S.F. 22A-24]

Thereafter, following a discussion between the Court and counsel with respect to the procedural adequacy of the subpoena and the tender of costs of production and witness fees [S.F. 24-28], the Court determined that Mr. McKelva would be permitted a reasonable opportunity to secure the forty-seven magazines and to produce them in court that afternoon [S.F. 29-30]. The Plaintiff City of Temple then continued with the presentation of its evidence.

When the Court reconvened after the noon recess, Michael McKelva was again called to the witness stand, and the following exchange transpired:

"BY MR. WILSON:

Q. You are the same Michael McKelva who was testifying earlier here in Court?

A. Yes, sir, I am.

Q. And are you further the same Michael McKelva who was instructed earlier by the Court on this day, the 1st day of February, 1972, in open Court to bring with you to Court at 1:00 o'clock certain magazines listed in the subpoena duces tecum with which you testified that you were served?

A. No, sir. It was 1973.

Q. I am sorry, you did not answer my question. Are you the same person?

A. No, sir, it was in 1973.

THE COURT: Apparently you are saying 1972, Mr. Wilson, instead of 1973. Try your question again.

Q. (BY MR. WILSON) All right, 1973, and I'm sorry.

A. Yes, sir.

Q. I am sorry, but I just haven't got over the change of the year yet.

A. Yes, sir.

Q. Do you have those magazines for the Court today?

A. No, sir.

Q. You do not?

A. No, sir.

Q. Have you attempted to secure those magazines?

A. No, sir.

Q. Have you made any effort at all to obtain those magazines?

A. No, sir.

Q. Were you fully aware at the time of the Court's instructions to bring certain magazines before the Court?

A. Yes, sir.

Q. Is it your testimony then that you are wilfully refusing to bring those magazines pursuant to the request made to you by the Court?
A. Yes, sir." [S.F. 77-79]

Following Mr. McKelva's second refusal to comply with the subpoena and the Court's order to produce the magazines, counsel for the City of Temple offered into evidence an affidavit establishing the tender of the witness fee, after which the following occurred:

"THE COURT: Do you have any questions that you want to ask this witness at this time?

MR. MANESS: Your Honor, if I might, I would like to ask the witness one question.

THE COURT: All right.

MR. MANESS: Mr. McKelva, are you refusing to produce the 47 magazines contained in the subpoena solely because you believe that the production of such magazines would entail a substantial possibility of self-incrimination?

A. Yes, sir, I do.

MR. MANESS: That is all I have, Your Honor.

THE COURT: You may stand down, Mr. McKelva." [S.F. 80-81]

The Court thereupon found Mr. McKelva to be in contempt of court and held, over the Petitioner's strenuous objection, that the witness's failure to respond to the subpoena would be regarded as an admission that the publications named in it were obscene. Judge Clawson deferred the imposition of punishment until the conclusion of the trial, and the City continued with the presentation of its evidence.

The testimony of Sergeant Vernon McKenzie, an officer of the Vice Division of the Temple Police Department, revealed that the titles of the magazines named in the subpoena served on Michael McKelva had been obtained by the Sergeant during the course of his investigation of Mr. McKelva's newsstand on January 4, 1973 [S.F. 109]. Sergeant McKenzie testified that at that time he had made a written list of the titles of those magazines he suspected were displayed in violation of the Temple obscenity ordinance [S.F. 110]. However, on cross-examination, Sergeant McKenzie admitted that he had no independent recollection by which he could identify any of the magazines whose titles he had listed, that he had viewed only the partially concealed covers of the publications and not their contents, and that he could not describe the cover of any specific magazine. The relevant testimony is as follows:

> "Q. These items that are contained on the list that has been marked Exhibit C-8, did you at any time examine the contents of these?
>
> A. No, not the contents.
>
> Q. All right, you never opened the cover or saw what was on the inside of these magazines?
>
> A. No, I did not.
>
> Q. Then for all you know they could have been filled with printed material, just writing or printed material, with the pictures just on the front and the back?
>
> A. Yes.
>
> Q. You could not testify otherwise, could you?
>
> A. I could not testify either way.
>
> Q. You testified as to what appeared on the outside of some of these materials was similar in nature to what appeared on the outside of some of the other

matters. If I were to ask you questions concerning specific issues, could you tell me what that issue showed?

A. No, I could not.

Q. Then it is correct, is it not, that you could not describe to the Court what is on the outside of each of these magazines?

A. I could describe that on most of these magazines the same type of little white coverings were on them.

Q. All right, but as to what was depicted on the exterior of the magazine, you could not testify as to what was on the exterior of the magazine, could you?

A. No, sir, I could not other than that they were similar to these.

Q. But you could not testify as to the specifics of the similarity, could you?

A. No, I could not." [S.F. 119-121]

No other evidence regarding the specific character or identity of the forty-seven magazines was introduced during the course of the trial.

At the conclusion of the trial on February 2, 1973, the Court reconvened and the following transpired:

"THE COURT: Counsel, does either side have anything further that they want to put in evidence?

MR. WILSON: No, sir, the Plaintiff does not.

MR. MALEY: No, Your Honor, the Defendant does not.

THE COURT: The Court will recall the Defendant Michael McKelva to the witness stand.

MICHAEL McKELVA

(RECALLED.)

THE COURT: Mr. McKelva, you have been adjudged to be in contempt of this Court for having failed to observe a subpoena duces tecum to bring certain matters with you as a witness. In your testimony with reference to why you failed to do this, you first indicated that it was on the advice of Counsel that you were declining to obey the subpoena, and so I want to ask you directly this morning, is your disobedience to this subpoena your own decision, or is it on the advice of Counsel, and if so, what Counsel?

A. It is on the advice of Counsel, sir, and Mr. Friedman, Mr. Maley and Mr. Maness.

THE COURT: Does either Counsel have any questions that they want to ask this witness?

MR. MANESS: Your Honor, I would only like to ask Mr. McKelva, in the event that his Counsel were to advise him that his privileges against self-incrimination were not endangered by producing the 47 magazines in question, whether or not under those circumstances he would produce the magazines?

A. I would.

MR. MANESS: Thank you, sir, and that is all.

THE COURT: Do you have any questions, Mr. Wilson?

MR. WILSON: No questions, Your Honor.

THE COURT: You may step down, Mr. McKelva. (Witness excused.)" [S.F. 149-150]

The Court then entertained the closing arguments of counsel and, after a short recess, found that all forty-seven magazines named in the subpoena were obscene "by ad-

mission of counsel." At this point Judge Clawson made the following statement from the bench:

> "This Court is finding not only Mr. Michael McKelva in contempt of this Court but is also finding Mr. Maley and Mr. Maness as his attorneys guilty of contempt of court.
>
> In each of these cases the Court is fixing the punishment for this contempt at ten days confinement in the Bell County Jail and a fine of two hundred dollars." [S.F. 153]

Petitioner's co-counsel thereupon excepted to the ruling of the court, gave oral notice of appeal, and requested a reasonable opportunity to appear and show cause on the contempt citation against the attorneys. The following transpired:

> "THE COURT: Mr. Maley, I want to point out to you that this Court has been most reluctant to find Counsel in contempt. As a matter of fact this [is] the first time in the history of this Court that I have ever adjudged an attorney to be in contempt of this Court but I find this Court totally frustrated at the attitude of Counsel in denying the access to the evidence which was contained in the subpoena duces tecum.
>
> This Court has not been permitted to rule on the admissibility of that evidence. You have ruled on it, on the admissibility of that evidence.
>
> I have found you in contempt because you have usurped the authority of this Court.
>
> You are familiar with the statutes of the State of Texas which give you a hearing on this matter. If you desire to be released on personal bond there is a statutory provision if you desire to file a motion

and you will be released on bond and this matter will be set for hearing before another Judge, who will be appointed by the Administrative Judge of this District.

MR. MANESS: Your Honor, may I be heard in my own behalf on one point?

THE COURT: Yes, sir.

MR. MANESS: If it please the Court, I certainly appreciate the Court's position. I think what we have here is not a situation, and I hope this is correct, where counsel have deliberately and intentionally attempted to frustrate the Court. I think that rather what we have is where there is a philosophical difference between counsel for the Defendant and the Court with regard to the applicable law as to self-incrimination and the production of evidence in a civil case.

THE COURT: Which could have been reached by a motion to suppress that evidence or by an objection to an attempt to introduce it. Counsel himself has admitted that Defendant is in possession of these items, denying the ownership of them very carefully but admitting possession of them. You are simply saying to the Court that because Counsel thinks that this is inadmissible evidence that it will not be subject to a subpoena under the power of this Court.

This Court is offended by your ruling, gentlemen. I am imposing the punishment as previously announced, ten days in jail and a two hundred dollar fine in each case, which is subject to your motion if you desire to file one.

MR. MANESS: Your Honor, on my own behalf, and on Mr. Maley's account, I apologize to the Court. I certainly want to express to this Court my own position and that is that it was not our intention

> or our purpose to offend the Court, and in that respect we apologize." [S.F. 157]

During this exchange Michael McKelva was escorted from the courtroom by a deputy sheriff and summarily jailed. As an officer of the Court the Petitioner was permitted by Judge Clawson to post a personal recognizance bond in order to secure his release pending trial of his guilt or innocence before another District Judge in accordance with the provisions of Article 1911a, section 2(c) [Appendix D, page 35], of the Revised Civil Statutes of Texas.

On February 6, 1973 Judge Clawson entered a formal written judgment finding Michael McKelva in contempt of court for having refused to obey the subpoena duces tecum and also finding the Petitioner in contempt for "advising and counseling the said Defendant to disobey said subpoena" [Tr. 31-32].

Judge Clawson also notified the Honorable Herman Jones, presiding judge of the Third Administrative Judicial District of Texas, that the Petitioner had been held in contempt of court, that he had requested trial before another District Judge, and that he had been released on his own recognizance. Judge Jones then designated the Honorable James R. Meyers, presiding judge of the 126th Judicial District Court of Travis County, Texas and the Respondent herein, to preside at the contempt trial of the Petitioner in the 169th Judicial District Court. The trial was held in Belton, Texas on May 11, 1973 at 10:00 a.m.

At that trial a representative of the Attorney General of Texas appeared in support of the contempt adjudication at the request of Judge Clawson. By agreement of counsel for both sides in open court, with the concurrence

of Judge Meyers, the case was tried exclusively on the basis of the record in Cause Number 57,284-C [S.F.C. 5-10]; no additional testimony or other evidence was presented to the Court.

With respect to the merits of the contempt adjudication, the Petitioner advanced two distinct defenses in his trial before Judge Meyers:

First, the Petitioner contended that Judge Clawson's order to produce the forty-seven magazines was altogether void in view of Michael McKelva's legitimate invocation of the Fifth Amendment privilege against self-incrimination, thereby precluding a determination that advice to disregard it constituted a contempt of court. [S.F.C. 11].

Secondly, the Petitioner argued that production of the magazines would have risked an irrevocable surrender of the Fifth Amendment privilege against self-incrimination in the absence of any effective judicial remedy for testing the legality of Judge Clawson's order prior to the time compliance was demanded, and that under these circumstances an attorney's professional obligation to his client would justify advising non-compliance. [S.F.C. 54-56].

At the conclusion of the trial Judge Meyers indicated that he was not prepared to rule on the matter immediately and requested that counsel for both sides submit additional legal memoranda on the questions of law involved. Following the adjournment of the proceedings, counsel promptly complied with the Court's request.

Thereafter, on September 28, 1973, Judge Meyers signed a judgment of contempt that affirmed, on the basis of the entire record in Cause Number 57,284-C, the finding of guilt entered by Judge Clawson against the

Petitioner. That judgment assessed a fine of $500 in lieu of the punishment imposed by Judge Clawson and further provided that the fine was to be paid to the Clerk of the 169th Judicial District Court not later than 12 o'clock noon on October 12, 1973, a procedure designed by Judge Meyers to allow the Petitioner an opportunity to secure further appellate review of the contempt judgment without being forced to undergo actual physical imprisonment because of non-payment of the fine [S.F.C. 64-67]. Both judgments of contempt are reproduced in Appendix A of this petition at pages 27-32.

On October 11, 1973, after being advised that both the Texas Court of Criminal Appeals and the Supreme Court of Texas had declined to review the validity of the contempt judgment on its merits, Judge Meyers signed an order permitting the Petitioner to remain at large on his personal recognizance bond, despite his failure to pay the fine, to allow the filing of a petition for the writ of certiorari in this Court.

REASONS FOR GRANTING THE WRIT

This case seems to be unprecedented. Apparently for the first time in the reported history of Texas criminal jurisprudence—and possibly for the first time in the recorded history of the Anglo-American common law—an attorney has been adjudged in criminal contempt of court for having advised a client of his right to assert the Fifth Amendment privilege against self-incrimination. The Court is thus confronted with a contempt judgment of extraordinarily serious dimensions, involving the perennial conflict between an attorney's professional obligations as an officer of the Court and his equally solemn commit-

ment to provide the effective assistance of counsel guaranteed to his client by the Sixth Amendment to the Constitution of the United States.

In the past the Court has repeatedly regarded the dilemma as one that presents substantial Federal questions requiring definitive review and resolution through the exercise of certiorari jurisdiction. The classic example is *Fisher v. Pace*, 336 U.S. 155 (1949), in which a Texas attorney who is now the Chief Judge of the United States District Court for the Eastern District of Texas persistently disregarded the Trial Judge's ruling in a workmen's compensation case that the method of computing recovery was not to be argued to the jury. Another decision in the same vein is *Hickman v. Taylor*, 329 U.S. 495 (1947), involving an attorney named Fortenbaugh who was forced to go to jail to protect the confidentiality of communications from his client before his right to do so was ultimately upheld by this Court in an opinion that has since become a landmark in the law of Federal discovery. See also *In the Matter of Green*, 369 U.S. 689 (1962).

These cases vividly demonstrate that the issue involved here is not whether the Petitioner will eventually pay a $500 fine and suffer the continuing stigma invariably associated with a criminal contempt judgment against a lawyer. Rather, the issue is whether every member of every bar of every Court in this country may continue to provide confidential advice to his client regarding the right to assert the privilege against self-incrimination without the lingering fear that some Judge, on his own initiative, will call the client to the witness stand in an effort to squeeze out testimony designed to provide a supposed evidentiary basis for holding the attorney in contempt of court.

From its inception the contempt judgment against the Petitioner has been grounded on the misconception that Michael McKelva was somehow not entitled to assert the Fifth Amendment privilege because the forty-seven magazines named in the subpoena duces tecum had previously been displayed for commercial distribution. This theory apparently proceeds on the dual premises that the privilege protects only "private" (in the sense of "confidential") communications and that an individual who displays magazines for sale has thereby "waived" any right he might otherwise have claimed to the protection of the Fifth Amendment.

In terms of both constitutional history and constitutional logic, the premises are demonstrably false. Unlike the Fourth Amendment, the historical origins of which reflect a primary concern for averting unwarranted assaults on individual privacy, the Fifth Amendment serves the additional and entirely distinct function of sheltering an individual from the hazards of producing testimonial evidence against himself, even if the information provided as evidence is otherwise universally known. To cite only one obvious example: the Fifth Amendment would have protected Jack Ruby against being subpoenaed to testify before a Dallas County grand jury that he shot Lee Harvey Oswald, despite the fact that millions of television viewers saw him do it. The right of privacy is not the source of the admonition that, under our accusatorial system of justice, "prosecutors are forced to search for independent evidence instead of relying upon proof extracted from individuals by force of law." *United States v. White*, 322 U.S. 694, 698 (1944). That axiom of our constitutional heritage remains unchanged, regardless of whether the proof extracted is denominated as "public" or "private."

Nor is the concept of "waiver" any more persuasive. At least since the landmark decision in *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), the Court has consistently indulged every reasonable presumption against the waiver of fundamental constitutional rights and has repeatedly refused to infer acquiescence in their loss from mere inaction or a silent record. *Glasser v. United States*, 315 U.S. 60, 70 (1942); *Smith v. United States*, 337 U.S. 137, 150 (1949); *Carnley v. Cochran*, 369 U.S. 506 (1962); *Boykin v. Alabama*, 395 U.S. 238 (1969). That strong presumption applies with undiminished force to the Fifth Amendment privilege against self-incrimination. *Marchetti v. United States*, 390 U.S. 39, 51-52 (1968).

Moreover, even apart from the fact that the forty-seven magazines were themselves testimonial or communicative in character, compulsory production of them pursuant to court process would also have been an intrinsically testimonial or communicative act to the extent that such production authenticated or verified the identity of the magazines as those sought by the subpoena; there is no other evidence in the record by which such identification or authentication could have been established. Accordingly, a previous public display of the material could not "waive" the testimonial disclosure implicit in the very fact of compliance with the subpoena. *Schmerber v. California*, 384 U.S. 757, 763-64 (1966); *Curcio v. United States*, 354 U.S. 118, 125 (1957); *United States v. Blank*, 459 F.2d 383, 385 (6 Cir., 1972); *United States v. Cohen*, 388 F.2d 464, 466 (9 Cir., 1967); 8 Wigmore, *Evidence* § 2264 (McNaughton rev. 1961).

If the Fifth Amendment does not protect an individual against a compelled testimonial production of commerci-

ally distributed magazines, there is no reason in principle why it should not also be deemed inapplicable to commercially distributed narcotics, stolen property and similar contraband. In that event the Fourth Amendment and the principle of probable cause become superfluous; rather than persuading the detached and neutral magistrate that grounds exist for issuance of a search warrant, the police officer need only testify before a grand jury that a suspect has contraband in his possession, after which he can be subpoenaed (on pain of contempt) to produce it.

Such an extravagant restriction of the privilege against self-incrimination would be totally at variance with the spirit of the Fifth Amendment. "To apply the privilege narrowly or begrudgingly—to treat it as an historical relic, at most merely to be tolerated—is to ignor its development and purpose." *Quinn v. United States*, 349 U.S. 155, 162 (1955).

Against this background the Petitioner has consistently contended that an attorney who in good faith advises his client to assert the privilege against self-incrimination cannot be adjudged in contempt of court because (1) compliance with a court order to produce potentially self-incriminatory testimonial or documentary evidence risks an irrevocable and irremediable surrender of a Fifth Amendment right, and (2) no effective judicial remedy is available to test the legality of the order before compliance with it. Thus, regardless of whether commercially distributed magazines are insulated against compulsory production by the Fifth Amendment privilege, the Petitioner's obligation under the Sixth Amendment to advise a particular course of action in the face of a constitutionally suspect court order threatening an irreparable deprivation

of a fundamental right must necessarily have transcended what, in other circumstances, would have been his duty as an officer of the Court to refrain from counseling obstruction to other court orders or decrees not entailing such spectacular disadvantages for the clients affected by them.

The totality of our experience under the Fifth and Sixth Amendments negates the suggestion that a witness confronted with the risk of involuntarily surrendering a legitimate invocation of the privilege against self-incrimination is entitled to no more than a catalog of his available alternatives. The Bill of Rights assures him of advice regarding what he *ought* to do, simply because an attorney's freedom to counsel his client to resist what in good faith is regarded as a constitutionally defective court order may very well mean the difference between an intelligent preservation of a fundamental Federal right and an ignorant, ill-considered and potentially disastrous relinquishment of it that results exclusively from the Trial Court's misconception of the law. An attorney has no professional obligation to remain inert when a Judge's hostility or insensitivity to the exercise of the Fifth Amendment privilege threatens a client's constitutional rights. In that case the primary duty is to the client, not to the Court.

Of course, it is altogether specious to argue that a lawyer must assume the risk that his good-faith estimate of the scope of the privilege may ultimately turn out to have been mistaken. Such an approach would effectively deter the transmission of precisely the sort of unrestricted, uninhibited advice that an untrained layman most desperately needs when assessing his predicament after a Trial Court has rejected his plea of the Fifth Amendment privilege.

Under our system of justice no attorney should fear being thrown into jail on a contempt judgment resulting, in the last analysis, from nothing more than an honest, good-faith answer to the inevitable question, "What would you do if you were in my place?"

The proceedings below were uniformly infected by the uncritical supposition that, according to the scale of values by which Judges and attorneys govern their professional lives, it is better that a constitutionally suspect court order be unwillingly obeyed by an ignorant and uninformed witness at the risk of irreparable constitutional injury than that a lawyer should counsel resistance to the orders of a Judge. The history of the privilege against self-incrimination does not support that assumption; on the contrary, the common law antecedents of the Fifth Amendment were deliberately designed expressly for the purpose of restraining and impeding the authority of those administrative and judicial tribunals (specifically, the High Commission and Court of Star Chamber) that attempted to grease the wheels of their official investigations by compelling the witnesses before them to provide evidence of their own guilt. The fabric of our Bill of Rights was woven on the premise that no Judge will be able to accomplish that result as long as an attorney stands in his way. That, in essence, is the reason why this judgment of contempt does not withstand even casual constitutional scrutiny.

The same considerations that prompted the Court to grant certiorari in *Fisher v. Pace*, 336 U.S. 155 (1949) and *Hickman v. Taylor*, 329 U.S. 495 (1947) necessitate review of the contempt judgment in this case.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully prays that the writ of certiorari be granted.

Respectfully submitted,

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Counsel for the Petitioner

APPENDIX A

NO. 57,284-C

CITY OF TEMPLE, TEXAS

v.

MICHAEL McKELVA, ET AL.
(In The Matter of Contempt:
KARL A. MALEY and MICHAEL ANTHONY MANESS)

In The District Court Bell County, Texas
169th Judicial District

JUDGMENT

BE IT REMEMBERED that on the 11th day of May, 1973, at Belton, Texas, the undersigned judge, Honorable James R. Meyers, sitting by designation in the above styled and numbered cause, conducted an evidentiary hearing, in accordance with Article 1911a, Tex. Rev. Civ. States., to review an order of the Honorable J. F. Clawson, entered in open court on February 2, 1973, which order found guilty of contempt of court Karl A. Maley and Michael Anthony Maness, officers of the Court, and which order further assessed the punishment for each contemnor at 10 days confinement in the Bell County Jail and a fine of $200.00.

The Court having considered the entire record in this cause of action, it is ORDERED that the findings of guilty entered by Judge Clawson against the said Mr. Maley and Mr. Maness be, and they are hereby, affirmed; and it is further ORDERED, in lieu of the punishment

assessed by Judge Clawson, that the said Karl A. Maley be, and he is hereby, assessed the following punishment: a fine of $500.00, to be paid to the District Clerk, 169th Judicial District, at or before 12 noon, October 12, 1973; and it is further ORDERED, in lieu of the punishment assessed by Judge Clawson, that the said Michael Anthony Maness be, and he is hereby, assessed the following punishment: a fine of $500.00, to be paid to the District Clerk, 169th Judicial District, at or before 12 noon, October 12, 1973.

Signed September 28, 1973.

/s/ JAMES R. MEYERS
Judge Presiding

STATE OF TEXAS
COUNTY OF BELL

I, D. CARPENTER, Clerk of the District Court of Bell County, Texas, do hereby certify that the attached and foregoing is a true and correct copy of Judgment entered in Cause No. 57,284-C styled:

CITY OF TEMPLE, TEXAS

v.

MICHAEL McKELVA, ET AL.
(In The Matter of Contempt:
KARL A. MALEY and MICHAEL ANTHONY MANESS).

as same appears of record in Volume 519 on page 23 of the Civil Minutes of the 169th District Court of Bell County, Texas.

GIVEN UNDER MY HAND AND SEAL OF SAID COURT this the 1st day of October A.D. 1973.

D. CARPENTER
District Clerk, Bell County, Texas

By: /s/ B. JAMES
Deputy

NO. 57,284-C

CITY OF TEMPLE, TEXAS

v.

MICHAEL McKELVA, ET AL.

In The District Court of Bell County, Texas
169th Judicial District

IN THE MATTER OF CONTEMPT

On this the 2nd day of February, 1973, came on to be considered the matter of the refusal of the Defendant Michael McKelva to obey the subpoena heretofore issued out of this court commanding him to bring into court certain matter listed in said subpoena:

And the Court having heard the statements of counsel and the testimony of said Defendant McKelva admitting in open Court to having willfully and knowingly refused to comply with said subpoena duces tecum and their reasons for so refusing being considered without merit, finds that the Defendant Michael McKelva and his attorneys, Karl Maley and Michael Anthony Maness are all and each of them in contempt of this Court, the Defendant for failing and refusing to obey the subpoena duces tecum issued out of this Court on the 24th day of January, 1973, and his attorneys for advising and counseling the said Defendant to disobey said subpoena; and the said Defendant and each of his said attorneys are order punished for said contempt by confinement in the Bell County Jail for a term of ten (10) days and payment of a fine of Two Hundred ($200.00) Dollars.

It is therefore ordered that the Sheriff of Bell County take into custody the said Michael McKelva, Karl Maley and Michael Anthony Maness, and confine them and each of them until they shall have each have served ten days from February 1, 1973 at 10:50 A.M. and paid their fines of Two Hundred Dollars each.

The said Karl Maley and Michael Anthony Maness having filed and presented their motion under Article 1911 RCS of the Statutes of Texas, are released on their personal recognizance pending hearing hereon in accordance with said Article.

/s/ J. F. CLAWSON
Judge, 169th Judicial District
Court of Bell County, Texas.

THE STATE OF TEXAS

To The Sheriff of Bell County—Greetings:

You are hereby commanded to receive, take into custody and confine within the jail of your County, Michael Anthony Maness, who is hereby committed to the said jail for the offense of contempt of Court arising out of the disobedience of certain orders in CAUSE No. 57,284-C The City of Temple v. Michael McKelva, Allen Boyer & T. C. McKelva et al. in the District Court of Bell County, Texas.

The said contemner shall be released from custody when all the conditions have been met and all payments made as set out in the attached exact copy of the judgment of the Court herein.

Given under my official hand and seal of said Court at Belton, Texas, this the 7th day of February, A.D., 1973.

J. F. CLAWSON
J. F. Clawson, Judge District Court
169th Judicial District,
Bell County, Texas.

APPENDIX B

NO. 4416

IN THE
COURT OF CRIMINAL APPEALS

EX PARTE

KARL A. MALEY

AND

MICHAEL ANTHONY MANESS

ORDER

On this the 11th day of October, A.D. 1973, came on to be heard the petitioner's motion for leave to file original application for writ of habeas corpus, and the court, after considering the said motion and the brief in support thereof, is of the opinion that such motion for leave to file an original application for writ of habeas corpus should be denied.

It is so ordered.

/s/ JOHN F. ONION, JR.
Presiding Judge

APPENDIX C

SUPREME COURT OF TEXAS

October 11, 1973

NO. B-4261

EX PARTE

KARL A. MALEY

AND

MICHAEL ANTHONY MANESS

ORIGINAL HABEAS CORPUS

Relators' petition for writ of habeas corpus, filed herein this day, having been duly considered in chambers, it is ordered that said petition be, and hereby is, denied.

It is further ordered that relators, Karl A. Maley and Michael Anthony Maness, pay all costs incurred and expended in this Court in the above case.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above is a true and correct copy of the order of the Supreme Court of Texas in the case of Ex Parte Karl A. Maley and Michael Anthony Maness, No. B-4261, Habeas Corpus, as such order appears in the minutes of said Court under the date of October 11, 1973.

IN TESTIMONY WHEREOF, Witness my hand and the Seal of the Supreme Court of Texas, at the City of Austin, on this the 11th day of October, 1973.

GARSON R. JACKSON, Clerk
By /s/ EUGENE CERVENKA, Deputy.

APPENDIX D

Article 527, Texas Penal Code:

* * *

"Sec. 13. The district court of this State and the judges thereof shall have full power, authority, and jurisdiction, upon application by any district, county, or city attorney within their respective jurisdictions, or the Attorney General to issue any and all proper restraining orders, temporary and permanent injunctions, and any other writs and processes appropriate to carry out and enforce the provisions of this article. Such restraining orders or injunctions may issue to prevent any person from violating any of the provisions of this article. However, no restraining order or injunction shall issue except upon notice to the person sought to be enjoined. Such person shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial. In the event that a final order or judgment of injunction be entered against the person sought to be enjoined, such final order or judgment shall contain a provision directing the person to surrender to the sheriff of the county in which the action was brought any obscene matter in his possession and such sheriff shall be directed to seize and destroy such matter."

Article 1911a, Revised Civil Statutes of Texas:

* * *

"Section 1. A court possesses inherently all powers necessary for the exercise of its jurisdiction and the enforcement of its lawful orders, including the authority

to issue such writs and orders as may be necessary or proper in aid of its jurisdiction. It has the duty to require that proceedings shall be conducted with dignity and in an orderly and expeditious manner and to so control the proceedings that justice is done. A court has the power to punish for contempt.

* * *

"Sec. 2. (a) Every court other than a justice court or municipal court may punish by a fine of not more than $500, or by confinement in the county jail for not more than six months, or both, any person guilty of contempt of the court;

* * *

"(c) Provided, however, an officer of a court held in contempt by a trial court, shall, upon proper motion filed in the offended court, be released upon his own personal recognizance pending a determination of his guilt or innocence by a judge of a district court, other than the offended court. Such judge to be appointed for that purpose by the presiding judge of the Administrative Judicial District wherein the alleged contempt occurred."